

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Hon. Patrick M. Meter, Hon. William C. Whitbeck and Hon. Bill Schuette

BUDDY MILLER,

Plaintiff-Appellant,

vs.

CHAPMAN CONTRACTING,
SWEEPMASTER, INC.,
RAMZY KIZY, JR. and
KEVIN PAPERD,

Defendants-Appellees.

Supreme Court No. 130808
Court of Appeals No. 256676
Oakland County Circuit Court No.
03-053572 NI

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PLAINTIFF - APPELLANT'S SUPPLEMENTAL BRIEF
ON APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF THE ISSUE

WHETHER THE COURTS BELOW ERRED IN CONCLUDING THAT PLAINTIFF-APPELLANT WAS NOT ENTITLED TO AMEND THE COMPLAINT TO CORRECTLY IDENTIFY THE NAMED PLAINTIFF AS WENDY TURNER LEWIS, AS BANKRUPTCY TRUSTEE FOR THE ESTATE OF BUDDY DALE MILLER, II, DEBTOR.

Plaintiff-Appellant say, "Yes."

The Trial Court said, "No."

The Court of Appeals said, "No."

Defendant-Appellee says, "No."

INTRODUCTION

On July 28, 2006, this Court issued an order permitting the parties to file supplemental briefs within 42 days of the date of its order. The Court directed the parties to avoid submitting a mere restatement of the arguments made in their application papers. In her application, Plaintiff-Appellant, WENDY TURNER LEWIS, bankruptcy trustee for the Estate of Buddy Dale Miller, II, debtor, argued that both the Oakland County Circuit Court and the Court of Appeals should have permitted the requested amendment for the purposes of correcting a misnomer and not for the purposes of substituting a new party.

SUPPLEMENTAL ARGUMENT

I. A NEW PARTY TO A LAWSUIT MAY BE ADDED WHERE THE DEFENDANT HAS NOTICE WITHIN THE STATUTORY PERIOD OF THE ADDED PLAINTIFF AND WHERE THERE IS NO PREJUDICE TO THE DEFENDANT.

In the event that this Court concludes that Plaintiff-Appellant's requested amendment would result in the addition of a new party rather than a correction of a misnomer, Plaintiff-Appellant urges this Court to recognize and affirm the rule set forth in *Hayes-Albion Corp. v. Whiting Corp.*, 184 Mich App 410; 459 NW2d 47 (1990) which permits a new plaintiff to be added where the defendant has notice within the statutory period of the "added" plaintiff and her claims and where the defendant will not be prejudiced by the addition of the plaintiff. 184 Mich App at 417. Without stating or suggesting that it was doing so, it appears that the Court of Appeals may have unintentionally superseded this rule in *Employers Mutual Casualty Co v. Petroleum Equipment, Inc.*, 190 Mich App 57; 475 NW2d 418 (1991) by virtue of Administrative Order No. 1996-4 which is now codified as MCR 7.215(J)(1).

In its *Employers Mutual* decision, the Court of Appeals, in disallowing an amendment to permit the addition of a new defendant, observed, "[a]lthough an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct,

transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties.” 190 Mich App at 63. The *Employers Mutual* decision did not address the application of the general rule to a newly added plaintiff of which a defendant had notice nor did it analyze other long standing exceptions to the general rule. In this regard, the *Employers Mutual* decision is distinguishable from the rule set forth in the *Hayes-Albion Corp. v. Whiting Corp.* decision.

In *Hurt v. Michael's Food Ctr.*, 220 Mich App 169; 559 NW2d 660 (1996), the Court of Appeals recognized the conflict between *Hayes-Albion Corp. v. Whiting Corp.* and *Employers Mutual Casualty Co v. Petroleum Equipment, Inc.* decisions. Despite its misgivings and disagreement with the application of the general rule observed in the *Employers Mutual* decision, the *Hurt* Court felt constrained to follow it by virtue of Administrative Order No. 1996-4 (now codified as MCR 7.215(J)(1)). The *Hurt* court stated that but for Administrative Order No. 1996-4, it would have followed the holding of *Hayes-Albion Corp. v. Whiting Corp.* and permitted the requested amendment to add a plaintiff even though the statute of limitations had already run.

The *Hurt* court explained the conflict as follows:

In contrast to *Employers Mutual*, where the plaintiff sought to add a party defendant, *Hayes-Albion* addressed whether the defendant was given notice when an added plaintiff sought to join the action by means of an amended complaint. In *Hayes-Albion*, this Court held:

Where the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, then a new plaintiff may be added and the defendant is not permitted to invoke a limitations defense. [Id. at

We believe that *Hayes-Albion* represents the better-reasoned rule. As noted in *Hayes-Albion*:

A key consideration in whether the court will allow the addition of a plaintiff is whether the defendant had notice within the statutory period of the "added" plaintiff and his claims. . . . If the defendant had the requisite notice of the "added" plaintiff and since the transactional base of the claim would have been pled before the period of limitation ran . . . the defendant would be prepared to defend all claims arising out of the transaction and would not be prejudiced by the addition of a plaintiff.

Although Michigan's relation-back rule was borrowed from FR Civ. P 15(c), the federal rule now has an additional provision addressing the addition of party defendants, thus making the application of the rule to plaintiffs easier by analogy. However, we find that the interpretation of the federal rule as applied to adding plaintiffs is helpful in looking at the question before us.

"As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense. This seems particularly sound inasmuch as the courts will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading. [6A Wright, Miller & Kane, Federal Practice & Procedure (2d ed), § 1501, pp 154-155.]" [184 Mich App at 417-418].

See also Doan v Chesapeake & O R Co, 18 Mich. App. 271; 171 N.W.2d 27 (1969); *Plowman v Satkowiak*, 22 Mich. App. 425; 177 N.W. 2d 641 (1970).

In the instant case, defendant had notice within the statutory period of Hicks and his claims and was prepared to defend all claims arising out of the February 24, 1983, incident. Thus, were it not for the administrative order, we would hold that defendant was not

entitled to invoke a limitations defense because Hicks' false imprisonment claim arises out of the conduct, transaction, or occurrence set forth in Hurt's original complaint.

Hurt v. Michael's Food Ctr., 220 Mich App 169, 179-181 (1996). Despite the acknowledged conflict, when the judges of the Court of Appeals were polled, a majority declined to convene a special panel to resolve the conflict. *Hurt v. Michael's Food Center, Inc.*, 220 Mich App 805; 566 NW2d 3 (1997). Leave to appeal was subsequently denied. 456 Mich 900; 575 NW2d 554 (1998).

This very conflict was argued by Plaintiff-Appellant in both Plaintiff-Appellant's original and supplemental briefs in opposition to Defendants-Appellees' motion for summary disposition. In those briefs, Plaintiff-Appellant argued that the rule set forth in *Saltmarsh v. Burnard*, 151 Mich App 476; 391 NW2d 476 (1986) had not been overruled by *Employers Mutual Casualty Co v. Petroleum Equipment, Inc.* The *Saltmarsh v. Burnard* case pre-dated the *Hayes-Albion Corp. v. Whiting Corp.* decision but relied upon the same reasoning and law.

Accordingly, should this Honorable Court conclude that Plaintiff-Appellant's requested amendment was not a request to correct a misnomer but rather a request to add a new party, the granting of Plaintiff-Appellant's application for leave will afford the Court an opportunity to resolve the conflict between the decisions in *Hayes-Albion Corp. v. Whiting Corp.*, 184 Mich App 410 (1990) and *Employers Mutual Casualty Co v. Petroleum Equipment, Inc.*, 190 Mich App 57 (1991) decisions and to clarify the application of the relation back doctrine to those cases where the defendant has notice within the statutory period of the plaintiff to be added and her claims and where the defendant will not be prejudiced by the addition.

RELIEF REQUESTED

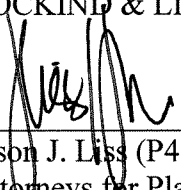
For the reasons set forth in Plaintiff-Appellant's Application for Leave to Appeal and this Supplemental Brief, Plaintiff-Appellant respectfully requests that this Honorable Court to grant

leave to appeal and reverse the judgments of the Oakland County Circuit Court and the Court of Appeals and enter an order that (1) Plaintiff-Appellant is entitled to amend the Complaint to correctly identify the named plaintiff as WENDY TURNER LEWIS, bankruptcy trustee for the Estate of Buddy Dale Miller, II, debtor, and (2) reverse the granting and affirmance of Defendant-Appellee's motion for summary disposition.

Respectfully submitted,

ROCKIND & LISS, PLLC

By: _____


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Dated: September 5, 2006

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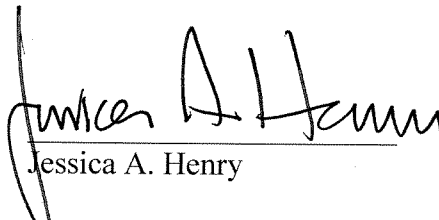
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PROOF OF SERVICE

The undersigned certifies that on September 6, 2006 she served a copy of the following papers upon the Court of Appeals Clerk, the Oakland County Circuit Court Clerk and attorneys of record in the above action by mailing the same to their respective addresses with first class postage fully prepaid thereon, said papers being described as follows:

1. Plaintiff-Appellant's Supplemental Brief on Application for Leave to Appeal;
and,
2. This Proof of Service.


Jessica A. Henry